STATE OF MICHIGAN

COURT OF APPEALS

RONALD McKENDRICK and CHARLENE McKENDRICK, Plaintiffs/Counter-Defendants-Appellees,	UNPUBLISHED January 25, 2011
v	No. 295268 Cheboygan Circuit Court
GREGORY ROMANIK and TONYA ROMANIK, Defendants/Counter-Plaintiffs-Appellants.	LC No. 07-007758-CH

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendants/Counter-Plaintiffs Gregory and Tonya Romanik (defendants) appeal as of right from the circuit court's order granting plaintiffs/counter-defendants Ronald and Charlene McKendrick's (plaintiffs) motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214.

Plaintiffs own a 275-acre parcel of property located in Cheboygan County, which they operate as the Renegade Ranch, a private hunting ranch (parcel A). Parcel A is completely enclosed by a fence. At issue is a 3.5 acre parcel of property located at the southeast corner of parcel A (parcel D). Defendants own a 6.5 acre parcel of property contiguous to the south of parcel D (parcel B). Both plaintiffs and defendants trace the title of their particular properties back to a common grantor, Walt and Marilyn Romanik (the Romaniks).[1] Defendants allege superior title to parcel D based on an asserted mutual mistake by the parties' predecessors in title. More specifically, defendants assert that their direct predecessors in title, the Romaniks, and plaintiffs' direct predecessors in title, Renegade Real Estate Associates, Inc. (RREA), an entity owned by Frank Walker, Jr., mistakenly transferred parcel D together with parcel A from the Romaniks to RREA on November 14, 1992. Defendants argue that the parties only intended to convey parcel A; there was no intention by the Romaniks or Walker that parcel D be conveyed to RREA.

[1] The Romaniks are defendant Gregory Romanik's parents

This Court reviews de novo the trial court's decision to grant plaintiffs' motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008); *Gorte v Dep't of Transp*, 202 Mich App 161, 171; 507 NW2d 797 (1993). "This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005), citing *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Thus, when reviewing a trial court's decision on a motion brought under MCR 2.116(C)(10), this Court must consider all of the substantively admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999); MCR 2.116(G)(6). Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

A party seeking summary disposition under MCR 2.116(C)(10) carries the initial burden of establishing through documentary evidence that there is no genuine issue as to any material fact. MCR 2.116(C)(10), (G)(3)(b); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). If this burden is met, the moving party will be entitled to a judgment as a matter of law unless the nonmoving party can demonstrate, with evidentiary support, that there remain genuine issues of material fact for resolution by the trier of fact. MCR 2.116(G)(4); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). A genuine issue of material fact exists when reasonable minds could differ on a dispositive factual issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

If a deed is unambiguous, it is presumed that the grantor intended to convey that which is expressly described within the deed. *Juif v State Hwy Comm*, 287 Mich 35, 41; 282 NW 892 (1938). However, a court of equity has the power to reform a deed if there has been a mutual mistake common to both parties, such that the deed does not accurately express their intentions. *Potter v Chamberlin*, 344 Mich 399, 407-408; 73 NW2d 844 (1955); *Stevenson v Aalto*, 333 Mich 582, 589; 52 NW2d 382 (1952); *Scott v Grow*, 301 Mich 226, 237; 3 NW2d 254 (1942). The mistake in question must be one of substance and fact, not one of law. *Emery v Clark*, 303 Mich 462, 471; 6 NW2d 746 (1942), citing *Burns v Caskey*, 100 Mich 94, 100; 58 NW 642 (1894). The party asserting the existence of a mutual mistake has the burden of establishing that a mistake occurred by clear and convincing evidence. *Stevenson*, 333 Mich at 589; *Emery*, 303 Mich at 471.

Defendants argue that the Romaniks sole intention was to convey to RREA that property where hunting took place on the ranch, which was within the fence surrounding parcel A. Likewise, defendants contend that RREA intended only to purchase parcel A, because the purpose of the acquisition was simply to acquire the hunting property. After reviewing the record, we find a paucity of evidence establishing a mutual mistake in the transfer. Walt Romanik testified he intended to only convey parcel A, but Walker testified that he believed parcel D was a part of the conveyance. Significantly, Walt Romanik never discussed the conveyance with Walker or obtained a survey prior to the sale. Defendants assert that RREA believed it was purchasing the property within the fence line that surrounded parcel A but not parcel D. However, neither the contract for sale nor the deed referenced the fence. Rather, both employ the standard metes and bounds descriptions.

Defendants also contend that Walker's testimony was contradictory with regard to the extent of the property he believed that RREA was purchasing. Defendants suggest that, at one point, Walker acknowledged that the conveyance was only supposed to include parcel A, citing deposition testimony by Walker seeming to indicate that he believed that the fence line enclosing parcel A matched the legal description for the property RREA was purchasing. That testimony was part of the following exchange:

> *Plaintiffs' counsel*: Did anybody ever represent to you that you were only purchasing what was confined within the fence line?
>
> *Walker*: Yes, it was according to the legal description, yes.
>
> *Plaintiffs' counsel*: The legal description?
>
> *Walker*: Yes.
>
> *Plaintiffs' counsel*: Do you know whether or not the fence line matched the legal description?
>
> *Walker*: As far as I know it does.

Contrary to defendants' assertion, however, the cited testimony does not establish an inconsistency in Walker's testimony. Walker's response to the question, "Did anybody ever represent to you that you were only purchasing what was confined within the fence line?", is ambiguous. The question asks about the fence line, but Walker responds with a reference to the legal description. Even plaintiffs' counsel seemed a bit confused by Walker's response, as he asked a clarifying question, "The legal description?", to which Walker responded, "Yes." It is in this context that the cited line of testimony must be understood. Thus, fairly read, Walker's testimony was not that RREA was purchasing only the property surrounded by the fence line, but instead, that it had been represented to him that the two were equivalent.

Defendants also argue that the existence of a mutual mistake is evidenced by the tax records, in that plaintiffs' delinquent tax notice for 2007 excluded parcel D, while defendants' delinquent tax notice for 2007 included parcel D. Defendant Gregory Romanik testified that his tax notice describes the land for which he has paid taxes since he purchased his property from the Romaniks in 1994. To accept the assertion that the parties' respective tax notices, and their paying of taxes due according to those notices, evidence the existence of a mutual mistake in the conveyance of property from the Romaniks to RREA, we must presume that the parties were familiar with the metes and bounds descriptions on their tax bills. However, there is no evidence of this. Indeed, McKendrick testified that he "[n]ever paid attention" to the legal description of covered and excluded property set forth on his tax bill. Additionally, the determination of the extent of each party's taxable property was in the hands of the taxing authority, MCL 211.19(1), and there is no evidence that the parties provided the assessing officer with statements of real property assessable to them, MCL 211.19(3), or that the officer had any independent any insight into the intent of the Romaniks, Walker and RREA at the time of conveyance.

At best, the documentary evidence indicates that if there was a mistake, it was unilateral. See *Stevenson*, 333 Mich at 589 ("In order to decree the reformation of a written instrument on

the grounds of mistake, that mistake must be mutual and common to both parties to the instrument."). Defendants failed to present sufficient evidence to create a genuine issue of material fact that the Romaniks intended something other than what was precisely expressed within the deed conveyed to RREA. Accordingly, the trial court did not err by granting plaintiffs' motion for summary disposition. See, *id.*

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering